IN THE

Supreme Court of the United States

October Term, 1978

No. 77-1305

PARKLANE HOSIERY COMPANY, INC. and
HERBERT N. SOMEKH,

Petitioners,

—against—

LEO M. SHORE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONERS

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This reply brief will answer Respondent's efforts to distinguish several cases relied upon by Petitioners in their main brief, and demonstrate that Respondent's authorities do not support or warrant the denial of a jury trial right to Petitioners in the circumstances presented upon this appeal.

I.

Cases cited by Respondent (Resp. br. pp. 10-13) to evidence the incursion of post-1791 procedures into Seventh Amendment rights do not support his contention. In two of the cases, *Parks* v. *Ross,* 11 How. 362 (1850) and *Greenleaf* v. *Birth,* 9 Pet. 292 (1835), no Seventh Amendment claim was asserted or considered. All such cases relate to procedural devices by which the court may control or mod-

ify the actions of juries already empaneled and acting, by directing or setting aside its verdict. The power of a court to set aside or direct a jury verdict does not offend the Seventh Amendment mandate that jury trials be preserved in suits at common law. In *Galloway* v. *United States,* 319 U.S. 392, *rehearing denied,* 320 U.S. 214 (1943) (Resp. br. pp. 12-13), this Court held, after making specific reference to pre-1791 analogies such as demurrer and motion for a new trial (319 U.S. at 390), that use of the directed verdict did not violate the Seventh Amendment. None of the cited cases considered, no less approved, the denial of a party's right to a jury trial.

In *Dimick* v. *Schiedt,* 293 U.S. 474 (1935), however, post-verdict procedure of *additur* was held not to meet the constitutional standard, and the Court announced a firm general principle of Seventh Amendment interpretation that post-1791 changes in common law cannot be employed to destroy the right to a jury in actions at common law. The distinction offered by Respondent (Resp. br. pp. 15-17) that *Dimick* was addressed only to the second clause of the Amendment (prohibiting re-examination of jury findings) and not to the first clause, at issue here (the preservation of the jury trial right), is not supported by the Court's opinion. The significance of *Dimick* lies both in its insistence upon historical inquiry as an indispensable method for determining Seventh Amendment questions and its statement of a basic tenet of Seventh Amendment interpretation:

> "Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care. Compare *Patton* v. *United States,* 281 U.S. 276, 312, 74 L.ed. 854, 869, 50 S. Ct. 253, 70 A.L.R. 263." 293 U.S. at 486.

Respondent's brief (pp. 17-18) points also to the fact that four Justices dissented from the majority opinion in *Dimick.* It should be noted that notwithstanding its disagreement with the majority holding, Justice Stone's dissenting opinion in *Dimick* belies Respondent's contention (Resp. br. p. 17) that the second clause of the Seventh Amendment is accorded greater protection than the first; the dissent would have approved the *additur* procedure as a permissible post-verdict mechanism but would have disapproved changes in the essential right of a litigant in an action at law to his trial by jury:

> "But this Court has found in the Seventh Amendment no bar to the adoption by the federal courts of these novel methods of dealing with the verdict of a jury, for they left unimpaired the function of the jury, to decide issues of fact, which it had exercised before the adoption of the Amendment. Compare *Nashville, C. & St. L.R. Co.* v. *Wallace,* 288 U.S. 249, 264, 77 L. ed. 730, 737, 53 S. Ct. 345, 87 A.L.R. 1191." 293 U.S. at 492.

Thus, the thrust of *Dimick,* for this appeal from a decision which would deny Petitioners *any* jury trial, is not diluted but left whole by the dissenting opinion.

Respondent (Resp. br. p. 19 n.) wisely declines to defend the observation made by the Court below that *Ross* v. *Bernhard,* 396 U.S. 531 (1970) "somewhat weakened" the principle of reliance on pre-1791 guidance in Seventh Amendment cases (App. A, pp. 15a-16a). *Ross* in fact reaffirms Seventh Amendment imperatives in light of modern procedures, and is squarely consistent with the earlier

decisions in *Beacon Theatres, Inc.* v. *Westover,* 359 U.S. 500 (1959) and *Dairy Queen, Inc.* v. *Wood,* 369 U.S. 469 (1962). In *Ross,* this Court examined the rule, theretofore consistently applied, that derivative stockholders' actions were creatures of equity jurisdiction and were tried in courts of equity without jury. It analyzed this history in light of the merger of legal and equitable cases under the Federal Rules of Civil Procedure ("Federal Rules"), and concluded that where a corporation would have been entitled at common law to a jury trial of its claim, the Seventh Amendment "preserves" (396 U.S. at 542) the same jury trial right for parties to derivative actions seeking enforcement of such claim. The Court in effect held that the jury trial right inhered in the character of the claim as an action at law, notwithstanding that procedural obstacles (the pre-merger separation of law and equity) prevented implementation of the right until adoption of the Federal Rules. Rather than having "somewhat weakened" the importance of historical inquiry, the decision in *Ross* confirmed it and applied it so as to permit enlargement, not contraction, of the jury trial right.

From the foregoing, it appears that this Court has been consistent in its adherence to the principle of preservation of the Seventh Amendment jury trial right; that the cases cited by Respondent fail to demonstrate any departure from such principle; that *Beacon Theatres* and *Dairy Queen* are clear reaffirmations of the pre-eminence of Seventh Amendment rights, both in the context of the merger provisions of the Federal Rules and generally; and, from *Ross,* that departure from historic jury trial practice may be employed only to preserve and vindicate jury trial rights and not to limit or extinguish them. In this state of the law, no reasonable basis can be perceived

to warrant judicial denial of Petitioners' right to a jury trial in the instant class action.

In one decision, *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation,* 402 U.S. 313 (1971) approved the application of the doctrine of estoppel in the absence of mutuality when asserted *defensively,* to avoid redundant litigation of the validity of a patent, and expressly reserved issues affecting use of the doctrine *offensively.* 402 U.S. at 330. In this case, Respondent has sought to employ, *offensively,* an estoppel based on a non-jury finding in a Securities and Exchange Commission ("SEC") injunction action to which Respondent was not a party and in which no injunction was granted, so as to prevent Petitioners from litigating its defenses in this class action, which was commenced a year and a half prior to the institution of the SEC action. Justice Black, in *Beacon Theatres,* stated that:

> "[O]nly under the most imperative circumstances, which in view of the flexible procedures of the Federal Rules we cannot now anticipate, can the right to a jury trial of legal issues be lost through prior determination of equitable claims. See *Leimer* v. *Woods* (CA 8 Mo) 196 F. 2d 828, 833-836. As we have shown, this is far from being such a case." 359 U.S. at 510-511.

No circumstances and surely no imperative circumstances, are presented here as would warrant the extension of *Blonder-Tongue* to this case and the loss of Petitioner's Seventh Amendment right to a jury trial.

II.

In *dictum,* the Court below stated that Petitioners had waived their right to a jury trial (App. A, p. 14a). Such waiver was not claimed by Respondent in the Court below,

nor argued in his brief to this Court. Accordingly, Petitioners do not argue the error of the statement.

Respectfully submitted,

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